United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

181

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,568-9

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN H. BROSKY,

Appellant.

ON APPEAL FROM A CRIMINAL CONVICTION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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1. Defense counsel's requested instruction to the effect that consent is a defense to a charge of sodomy, found in the Record on Appeal.

2. Transcript: (a) 135-138b

(b) 8-11a, 65b, 96b, 119-120b

(c) 43-446, 68-70b, 80-81b, 128-131b

["a" indicates pages appearing in the Transcript of trial proceedings on June 29 and June 30 (a.m. session), 1970; "b" indicates pages appearing in the Transcript of trial proceeding on June 30 (p.m. session) and July 1, 1970.]

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STATEMENT OF QUESTIONS PRESENTED

1. Whether it was error for the trial court, over defense counsel's objection, to give the jury the standard Allen charge in the circumstances of this case.

2. Whether it was error for the trial court, over defense counsel's objection, to allow the prosecution to admit appellant's 1965 conviction of interstate transportation of forged securities

for impeachment purposes in the circumstances of this case.

3. Whether it was error for the trial court to refuse to instruct the jury, at defense counsel's request that consent would be a defense to a charge of sodomy.

4. Whether the male/female composition of the prospective juror panel was so heavily weighted with females that appellant was denied his Sixth Amendment right to a jury of his peers in a prosecution for rape and sodomy.*

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* By order of this Court dated October 13, 1970 I was appointed counsel in this case; said order also set December 14, 1970 as the date for filing appellant's brief. In the interim period, after reading the transcript of testimony, conferring with court-appointed trial counsel, and researching the law, I determined that the above described defense might be meritorious in the circumstances of this case. However, since court appointed trial counsel had not requested any transcript of the voir dire examination of the prospective jurors, I filed an application with the District Court on December 10, 1970 requesting an order requiring the transcript of such examination at no expense to appellant. In addition, I simultaneously filed a motion with this Court for an extension of time until December 23, 1970 or five days after receipt of said transcript (whichever occurs sooner) in which to file appellant's brief. The District Court granted my application on December 11, 1970, but to date I have not received the requested transcript. Accordingly, I have decided to file appellant's brief as of December 23, reserving the right to submit in the form of a supplement to appellant's brief a short argument that the instant composition of the jury panels contravened the Sixth Amendment. The U. S. Attorney's office has agreed to this procedure, and will seek an extension of time within which to file its appellee brief until after appellant's entire brief, including the supplement, if any, is filed.

STATEMENT PURSUANT TO RULE 8(d)

This case has never been before this Court on the merits. (On August 11, 1970, this Court denied appellant's motion for release on personal bond pending trial, it appearing that his trial had already been completed and appellant had been found guilty as charged. No. 24,192.)

REFERENCES TO RULINGS

On July 30, 1970, the trial court adjudged appellant guilty as charged and imposed sentence.

Defense counsel made a motion for acquittal after the prosecution rested, which was denied (Tr. 202a)[1/], and made the same motion after the defense rested, which likewise was denied (Tr. 77b).

Appellant filed a pro se motion for judgment of acquittal on July 15, 1970, which was denied by the trial court on that date.

1/ The letter "a" follows page references to the Transcript of proceedings on June 29 and June 30 (a. m. session), 1970. The letter "b" follows page references to the Transcript of proceedings on June 30 (p. m. session) and July 1, 1970.

STATEMENT OF THE CASE

Appellant was tried and convicted by jury trial of one count of rape while armed (22 D.C. Code §3202), two counts of sodomy (22 D. C. Code §3502), and two counts of assault with a dangerous weapon (22 D. C. Code §502). The acts were alleged to have taken place on the night of August 26-27, 1969, in the District of Columbia on the persons of Carla Allensworth and Jean Ayers. Appellant was tried by jury on June 29-July 1, 1970. He was sentenced on July 30, 1970, to 5-20 years for rape while armed, 3-10 years for sodomy, and 3-10 years for assault with a dangerous weapon, all sentences to run concurrently. Appellant is presently serving sentence.

Following is a synopsis of the relevant trial testimony.

TESTIMONY OF CARLA ALLENSWORTH

Miss Allensworth testified that on August 26, 1969, she drove from her home in Virginia with her friend Jean Ayers to the Grog Tankard, a bar and restaurant in the District of Columbia, arriving at approximately 9 p. m. (Tr. 22-24a). They sat down alone and had a couple of beers. At about 11 p. m. a stranger, Mr. Finnegan, sat down with them and they all engaged in general conversation (Tr. 24-25a). Shortly thereafter a business card and two beers were sent to the table; the waitress said that Mr. Brosky had sent them (Tr. 25a). Misses Ayers and Allensworth read the card. "It said something like do you come in pairs or go separately, because if you do I want to take you for a ride and then come back here for a drink" (Tr. 26a). They thanked Mr. Brosky for the beers, and, at the suggestion of Mr. Finnegan, Brosky joined them (at about 11:20 p. m. Tr. 62a) and all four engaged in conversation (Tr. 27a). Brosky talked with Allensworth about stereo tape systems for cars. Finnegan then left and Allensworth, Ayers and Brosky continued talking (Tr. 28a). At about midnight, Allensworth and Ayers left the table briefly to call Allensworth's mother and go to the restroom (Tr. 29a). They returned to the table and prepared to leave; Brosky walked out with them, and when Ayers said she wished to phone her mother, Brosky suggested she use the phone at the Bob White Buick dealership, where Brosky worked. It was a short walk away (Tr. 29-30a).

Allensworth and Ayers voluntarily accompanied Brosky to the dealership (Tr. 67-68a). Allensworth testified that she went there to look at cars on display (Tr. 30a).

At the dealership, Brosky showed Ayers into an office so she could make her call, while Allensworth looked at a car on display; she and Brosky talked about stereo tape systems and then walked into another room to look at an automobile diagram (Tr. 30-31a). There were no other persons in the dealership (Tr. 68a).

Miss Allensworth testified that the following then transpired: Brosky put his hand over her mouth and shoved her to the floor. Ayers then walked in and Brosky jumped up, shut the door, and ordered them to undress (Tr. 31-32a). Ayers grapped a pair of clippers which were leaning against the wall, pointed them at Brosky and told him to leave them alone. A struggle ensued, Brosky secured the clippers, and then told them: "If you want to play games, then we will play games . . . . You'd better do what I tell you and take off your clothes or else I will kill you." (Tr. 32-33a). Ayers and Allensworth undressed and lay face down on the floor. Brosky placed the clippers on a desk and told Ayers to kneel before him and made her commit oral sodomy on him (Tr. 33-34a). Brosky then had Allensworth do the same thing. He pushed her back, said "She bit me", and wiped his penis off on Ayers' dress (Tr. 34-35a). Ayers then complained that she had just had an operation and needed some pills or would die.

Brosky looked in her purse, but couldn't find any pills (Tr. 35-36a). Brosky then had Ayers commit acts of oral sodomy on Allensworth and then he had genital and anal intercourse with Allensworth (Tr. 36-37a). Allensworth and Ayers did not attempt to flee or attract attention of passers-by during any of this time (Tr. 81a).

Then they all got dressed and left the dealership, with Ayers complaining about needing some pills (Tr. 37-38a). Brosky walked them back to their car and gave them directions to a hospital (Tr. 38a). Allensworth and Ayers then drove off, stopped a policeman and related to him their version of these events (Tr. 38-39a). After police questioning at the station house and investigation of the dealership showroom, Allensworth and Ayers drove to a hospital, arriving at about 5 a. m. (Tr. 38-39a).

On cross-examination, Allensworth denied that she and Ayers asked Brosky for $45.00, saying they needed money, or that they offered to perform sex acts for him for this money (Tr. 82-83a; 84-85a); she also denied that she performed the sex acts with Brosky voluntarily (Tr. 85a).

TESTIMONY OF JEAN AYERS

Miss Ayers testified that she and Miss Allensworth, on the night of August 26, 1969, drove from Virginia to the Grog and Tankard in the District of Columbia, arriving at approximately 9 p. m. (Tr. 89-90a). They sat down together and ordered some beer. While

Allensworth was in the restroom, Brosky, who was sitting at an adjoining table, handed Ayers a business card, told her to read it and give him an answer. Written on the card were words to the effect: "Do you come alone or are you together. And if you are together, I would like to take you for a ride and then come back here and have a drink." Allensworth returned and Ayers showed her the card, and they laid it aside (Tr. 91a). Then a Mr. Finnegan, a stranger to Ayers and Allensworth, came over and sat down (It was about 11 p. m.), and the three of them engaged in conversation (Tr. 91-92a). The waitress then brought them two beers bought by Brosky. They thanked him, and, at the suggestion of Finnegan, Brosky joined them at about 11:15 p. m., Allensworth saying to him, "sit down." (Tr. 92-93a; 110a). They engaged in a conversation about cars, and Finnegan left the table about 10-15 minutes after Brosky sat down. Ayers and Allensworth then got up and telephoned the latter's mother, and then went to the restroom. (Tr. 93a). When they returned to the table, they got ready to leave and walked outside, with Brosky following them out. Ayers said she had to phone her mother and Brosky suggested she use the phone at the Bob White Buick dealership. Ayers and Allensworth voluntarily walked over to the dealership with Brosky; there was no use of force or threats (Tr. 94a, 113a).

Brosky unlocked the door and all three walked in. Ayers did not see anyone else in the dealership (Tr. 113a). Ayers went into an office and called her mother. She then left the office and opened the door to another room and entered (Tr. 94a).

Miss Ayers then testified that she saw Allensworth on the floor with Brosky's hand over her mouth. He jumped up and closed the door, and told them to undress (Tr. 94-95a). They pleaded with him, and then Ayers picked up a pair of clippers; Brosky took the clippers away from her, and Allensworth unsuccessfully tried to get them away from him (Tr. 95a). Brosky, with the clippers in his hands, told them to undress. They complied, and he then told Ayers to commit oral sodomy on him, which she did (Tr. 95-96a). He then told Allensworth to do the same thing, and then he said: "She bit me;" Ayers saw blood around Allensworth's mouth (Tr. 96a). Ayers was then told to commit acts of oral sodomy on Allensworth and she did so, and then Brosky had rectal intercourse with Allensworth (Tr. 96-97a). At no time during these events did Ayers scream or try to seek assistance (Tr. 116-118a). Ayers complained that she had just had an operation and needed to get to a hospital for some pills. Brosky looked unsuccessfully for pills in Ayers' purse. At about 12:25 a. m. he told them to get dressed and he carried Ayers outside to her car, and directed them to a hospital (Tr. 97-98a).

Allensworth and Ayers drove off and shortly stopped a policeman. Following questioning at the station house and an investigation of the dealership, they drove to a hospital, arriving around 4:30-5:00 a. m. (Tr. 98a).

On cross-examination, Ayers denied that she asked Brosky for $45.00 or that she had told Brosky she would perform certain sex

acts for him for the money (Tr. 122-123).

On recross-examination, Ayers testified that, while in the restroom, Allensworth told her that she wanted to go with Brosky to the Buick dealership to see some auto equipment, and that Ayers could call her mother from there. Ayers told her that she didn't want to go because she had to get home but they had not decided whether to go with Brosky or not at the time they left the restroom and returned to the table (Tr. 150-153a).

TESTIMONY OF JOHN BROSKY

Appellant John Brosky testified that he was the last employee to leave the Bob White Buick dealership on the night of August 26, 1969; he locked the premises and left about 9:00 or 9:15 p. m. (Tr. 13-14b). After buying gas for his car, he went to the Grog and Tankard, arriving about 9:30 or 9:45 p. m. (Tr. 14b).

While sitting alone at a table he noticed Misses Allensworth and Ayers. He then gave a business card to the waitress to give to them, on which he had written, "I don't want to be rude, but I would like to buy you a drink" (Tr. 16b). Mr. Finnegan then sat down with Allensworth and Ayers. The three of them invited Brosky to join them, which he did (Tr. 17-18b). They began discussing cars, and Brosky told Allensworth that he could show her an Opal GT at the dealership that night, but neither Allensworth nor Ayers indicated at that time that they would go to the dealership (Tr. 18-20b). Allensworth and Ayers made a phone call, went to the restroom,

returned to the table and said they were leaving (Tr. 22b). Brosky figured he had "struck out as far as trying to make a date with them," and decided to go home (Tr. 22b). He walked out of the Grog and Tankard, a short distance behind Ayers and Allensworth. Outside he asked Allensworth if she wanted to see the car and a stereo tape system at the dealership. She said yes, and Ayers said she had to make a phone call. Brosky suggested she make the call at the dealership. All three then walked to Bob White's (Tr. 22-23b). Brosky did not threaten or force them to go with him (Tr. 23-24b).

Brosky unlocked the door to the dealership and showed Ayers into an office to make her call. Allensworth was looking at a car on display, and Brosky said he'd show her a diagram of the car in another room (Tr. 24-25b). The two of them walked into the room and Brosky showed her the diagram (Tr. 27-28b). Ayers then walked into the room and the two girls stepped away to talk together (Tr. 28b). Brosky had not thrown Allensworth to the floor (Tr. 28b). Brosky turned toward Allensworth and Ayers, and saw the former holding a pair of hedge clippers in front of her, slightly opened (Tr. 28-29b). Allensworth told Brosky they wanted $45.00. Brosky laughed, and Allensworth said it wasn't funny (Tr. 29b). Brosky then jumped towards them and secured the clippers in a struggle (Tr. 30-31b). Brosky reached for the phone and the girls started to cry and said "don't get us into trouble" (Tr. 31-32b). Brosky laid the clippers on a desk and asked them why they wanted the money. They kept crying, and he said he was going to call the

police, but Allensworth said "you were out to pick up some girls and we know why." She said "if we go along with you, will you let us go," and Ayers said "please don't get us in trouble." Brosky said "well then forget the police" (Tr. 32-33b). Allensworth and Ayers undressed; Ayers said "don't hurt me, because I just had an abortion" (Tr. 33b). Brosky removed his pants, but said he couldn't do it -- couldn't get excited. Then Allensworth knelt down and committed oral sex with him, biting him and drawing blood (Tr. 33-34b). He started to reach for his pants when Ayers came over and also committed oral sex with him (Tr. 34b). Allensworth then laid down on the floor and told Brosky to have anal intercourse with her. He tried, but said he couldn't get excited. Allensworth then rolled over and told him to have intercourse with her. Just as Brosky was attempting this -- he wasn't sure whether he made entry or not -- Ayers began holding her stomach and saying she needed some pills (Tr. 34-35b). Brosky got up, put his pants on, and tried to find the pills in Ayers' purse, but she said she had to get them from the hospital (Tr. 35-36b). They got dressed, left the dealership, and Brosky carried Ayers, who was complaining of pain, towards his car, but Ayers said she wanted to take her own car. He carried her to her car, gave them directions to a hospital, and Allensworth and Ayers drove off (Tr. 35-37b). Brosky denied using any force or threats to make Allensworth and Ayers engage in the sexual acts with him, and denied threatening them with clippers (Tr. 416). Brosky went to work

the next morning, but was unable to work because he was worried about Miss Ayers -- whether she was seriously ill or not (Tr. 39b).

OTHER TESTIMONY

Mr. Finnegan and Miss Patricia Whaley (the waitress at the Grog and Tankard) testified as to the events occurring, within their knowledge, at the Grog and Tankard. Their testimony does not differ materially from that of Brosky, Allensworth and Ayers. Likewise the testimony of Officer Jerome Roach (policeman stopped by Allensworth and Ayers), Detective Vincent Incavo (one of the investigating detectives), and Detective Francis Baker (arresting officer) dealt with peripheral matters which showed that a fresh complaint was made to the police closely on the heels of the alleged sexual acts in question. Appellant did not contest at trial that these sexual acts took place, and does not, of course, do so here.

Finally, certain facts which were stipulated and read to the jury also dealt with corroboration. Of note is the stipulation that Dr. Michael Hitchcock, who examined Allensworth at D. C. General Hospital at approximately 4 a. m. on August 27, 1969 (about four hours after the acts in question took place), found no blood or bruises on the rectum or blood in the vaginal area of Miss Allensworth (Tr. 189-199a). It was also undisputed that there was a telephone in the room in which the sexual acts took place (Tr. 182a).

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY GAVE THE JURY THE ALLEN CHARGE. [The Court's attention is directed to the following pages in the Transcript: 135-138b.]

As described infra, after the jury had deliberated approximately five hours and had informed the Court that it was deadlocked, the trial judge supplemented his instructions to the jury with the so-called Allen charge. Under the circumstances of this case, this charge was so potentially coercive as to have deprived appellant of his constitutional right of due process and conviction only upon the unanimous agreement of twelve uncoerced jurors.

The jury left the courtroom to deliberate at 10:24 a. m. on July 1, 1970 (Tr. 135b). At 3:45 p. m. on the same day, approximately five hours later, the jury informed the trial judge that it was unable to come to a complete agreement (Ibid). Thereupon the trial judge so informed the defense counsel and the prosecution, and told them that he planned to recall the jury, ask them if they had come to an agreement on any of the counts, and then give them the Allen charge (Ibid). Defense counsel objected (Ibid), but was overruled (Tr. 136b). The jury was then brought back into the courtroom where the following colloquy took place:

> THE COURT: Mr. Foreman, I have your note. You say you can't come to a complete agreement.
>
> Without indicating how you stand, have you reached an agreement on any of the six counts?
>
> THE FOREMAN: Yes.
>
> THE COURT: How many counts have you reached an agreement on?

THE FOREMAN: On two.

THE COURT: Two out of the six?

THE FOREMAN: Yes. (Tr. 136-137b)

Although we do not know to a certainty which two counts the jury had agreed on at that point, it can almost conclusively be presumed that they had agreed on the two sodomy counts. Conviction on those two counts was a foregone conclusion. Appellant himself admitted on the stand that he had had oral sodomy with the two female complainants. His sole defense was that they had voluntarily consented to such acts. Given the trial judge's refusal to instruct the jury that consent would be a defense to statutory sodomy,[2/] the jury had no alternative but to convict appellant on these two counts.

That this was then the status of the jury's deliberations is totally consistent with the jury's deadlock on the other counts (armed rape and the lesser included charge of rape and two counts of assault with a dangerous weapon). For the entire question really facing the jury was that of consent. Appellant had taken the stand and admitted that the sexual acts themselves had taken place. His defense was that they were voluntarily consented to by the female complainants. They, on the other hand, alleged that they were committed by threat of force. There were no other eyewitnesses. Thus,

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2/ Defense counsel requested a consent instruction on the sodomy counts, and properly noted his objection to the trial court's failure to give such. That failure is also urged on this appeal as error. See pp. 25-30 infra.

the jury was in effect left only with a question of credibility -- the determination of whether to believe appellant's testimony or that of the two complainants. Some of these reasonable men and women -- we don't know how many, but one is enough -- obviously believed appellant's testimony that the complainants had consented voluntarily to the sexual acts in question, and that no force or threat thereof was used.[3] "It seems not unlikely that jurors faithful to their oaths might have been troubled in attempting to reach a verdict on the proofs introduced at trial." U.S. v. Thomas, ___ U. S. App. D.C. ___, ___ F.2d ___ (November 6, 1970; slip op. at 11).[4]

It was thus obvious that credibility was the only issue in dispute. Despite the obvious fact that twelve reasonable jurors could not conclude beyond a reasonable doubt that the female complainants had not consented to the acts in question -- the trial judge proceeded to give the Allen charge:

> THE COURT: Members of the jury, at this time I'm going to give you one additional instruction.
>
> In a large proportion of cases absolute certainty cannot be expected.
>
> Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of your fellows, yet you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other.

3/ This despite the court's admission, over defense counsel's objection, for impeachment purposes of appellant's 1965 conviction for interstate transportation of forged securities. This admission is challenged on this appeal as error. See pp.22-24 infra.

It is your duty to decide the case if you can conscientiously do so.

You should listen to each other's arguments with a disposition to be convinced.

If much the larger number of jurors are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression upon the minds of so many jurors, equally honest, equally intelligent with himself.

If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.

You may resume your deliberations (Tr. 137b emphasis added). The jury left the courtroom to resume its deliberations at 3:54 p. m. (Tr. 138b). At 4:25 p. m. the jury returned and announced its verdict (Ibid).

Although the Allen charge has been subject to a great amount of criticism from the courts, the criminal law bar, and commentators,[5] it is not urged on this appeal that the charge is coercive per se -- a claim which this Court has rejected in the past.[6]

5/ See, e.g., U.S. v. Thomas, supra; U.S. v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969), cert. denied 396 U.S. 837 (1969); U.S. v. Brown, 411 F. 2d 930 (7th Cir. 1969); Huffman v. U.S., 297 F.2d 754, 759 (5th Cir. 1962; Brown, J., dissenting); State v. Thomas 86 Ariz. 161, 342 P. 2d 197 (1959); State v. Randall, 137 Mont. 534, 353 P. 2d 1054 (1960); Note, "On Instructing Deadlocked Juries," 78 Yale L.J. 100 (1968); Note, "Due Process, Judicial Economy and the Hung Jury: A re-Examination of the Allen Charge," 53 Va. L.Rev. 123 (1967); Note, "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'," 31 U.Chi. L.Rev. 386 (1964).

6/ See the discussion of Fulwood v. U.S., 125 U.S. App. D.C. 183, 369 F2d 960 (1966), cert. denied, 387 U.S. 934, in the Thomas case supra, at slip op. p. 7.

In the circumstances of this case, as described above, however, the use of the Allen charge was likely to have been coercive and therefore constituted prejudicial error. As this Court recently stated in Thomas, supra at 6:

> Every defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of a jury of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude. When efforts to secure a verdict from the jury reach the point that a single juror may be coerced into surrendering views conscientously entertained, the jury's province is invaded and the requirement of unanimity is diluted (emphasis added; footnotes omitted).

The Allen charge, "even when unembellished by further exhortations, is 'potentially coercive,' and . . . 'its content and manner of use deserve scrutiny.'"[7] "Communications from judge to jury are unduly constraining whenever they portend a substantial propensity for prying individual jurors loose from beliefs they honestly have."[8]

Certainly in the circumstances of this case the jury's deadlock was not unreasonable. The events in question were readily ascertained and the real task was to try to reach agreement on which of two conflicting versions of the facts to believe (both certainly believable in and of themselves). "Equivocal evidence can raise problems for conscientious jurors and increase their susceptibility to judicial prodding for a verdict they seem otherwise unable to reach."[9]

7/ U.S. v. Thomas, supra at 8 (footnote omitted).
8/ Id. at 9-10 (footnote omitted).
9/ Id. at 12 (footnote omitted).

This Court has thus recognized its "responsibility to appraise the activities complained of [Allen charge], not by the good intentions behind them, but according to whether, all circumstances considered, they strayed beyond legitimate bounds with a substantial probability of prejudice to the accused."[10] (Emphasis added.)

Furthermore, in Thomas, supra, this Court also recognized the evils inherent in the Allen charge, particularly where, as here, it includes the so-called "majority-minority element," an element long ago abandoned by many trial judges.[11] Precisely because of these serious shortcomings, the Court, in the exercise of its supervisory power, prospectively forbade the use of the traditional Allen charge, and commanded the courts under its jurisdiction to thereafter utilize only the ABA approved instruction, which eliminates the much maligned "majority-minority" element."[12] Thomas was decided on November 6, 1970; hence, under Thomas the failure of the Court below to give an ABA approved instruction at the culmination of appellant's earlier trial on June 29-July 1, 1970 does not per se constitute reversible error. But this in no way undermines the force of appellant's argument that in the circumstances of this case the Allen charge was in fact potentially coercive and thus unconstitutional.

The scrutiny which this Court said it must subject the circumstances under which the Allen charge is given should be even greater

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10/ Ibid.
11/ Id. at 20, n. 71; U.S. v. Johnson, ___u.s. App. D.C. ___, ___ F. 2d ___ (June 19, 1970; slip op. at 12-13)
12/ See next page

and demand an even stricter assurance that no prejudice to appellant occurred, in light of this Court's decision in U. S. v. Johnson, ___ U.S. App. D.C. ___, ___ F.2d ___ (June 19, 1970, slip op.),

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12/ American Bar Association, Standards Relating to Trial by Jury 145-46 (1968):

§ 5.4 Length of Deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
(i) that in order to return a verdict, each juror must agree thereto;
(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
(v) that no juror should surrender his honest conviction as to weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

rendered prior to appellant's trial. In Johnson, this Court likewise severely criticized the Allen charge, but determined not to exercise its supervisory powers, which it has now done in Thomas, and require use only of the ABA instruction. The Court did, however, strongly suggest that trial judges thereafter eliminate the "majority-minority element" from the Allen charge.[13/] Given this Court's expressed distaste for the Allen charge in Johnson and its clear indication that it likely would at some future time forbid the Allen charge[14/] (which it then did in Thomas), it is apparent that at least from that date (June 19, 1970) forward, the Allen charge, with its inherently "evil" majority-minority element, should have been given only in cases where it clearly would not result in any potential prejudice to an accused. Such prejudice was not absent here.

13/ "[The majority-minority element] is the one which has widely been thought to contain the true dangers to free and unfettered exercise of individual judgment and expression of conscience which is at the very core of the jury system. Many trial judges, although still using the Allen charge, have abandoned this element of it long ago. With the benefit of the new American Bar Association analysis and recommendation, trial judges in this circuit may hereafter think it desirable to do the same." Johnson, supra at 12-13. See also, Thomas, supra at 16-17: "A decade ago, the Supreme Court of Arizona declared 'that the evils [of the Allen charge] far outweigh the benefits.' Our opinion in Johnson made it clear that we felt exactly the same way. There, we advanced the ABA standard and its implementing instruction as recommendation to trial judges." (footnotes omitted).

14/ U.S. v. Johnson, supra at 13-14

II. THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO ADMIT A PRIOR CONVICTION OF APPELLANT FOR IMPEACHMENT PURPOSES.

[The Court's attention is directed to the following pages in the Transcript: 8-11a; 65b; 96b; 119-120b.]

The prosecution was permitted, on cross-examination of appellant, to introduce appellant's 1965 conviction of interstate transportation of forged securities for impeachment purposes (Tr. 65b).[15] Under the circumstances of this case, such admission was prejudicial error.

Prior to commencement of the trial, a Luck[16] hearing was conducted by the trial judge (Tr. 8-11a). In vigorously objecting to any admission into evidence of appellant's prior conviction, defense counsel made it clear that it was essential that appellant testify at trial, since he was the only witness who could relate his version of the facts (Tr. 9a). Defense counsel correctly pointed out that the only issue involved in the case was credibility and argued that introduction of the prior conviction would prejudicially tip the scales against appellant (Tr. 10-11a). There was no question involved as to whether the sexual acts took place and that the appellant was a participant. Appellant's sole defense was consent -- that the two female complainants voluntarily engaged in the acts with appellant. There were no other eyewitnesses. Appellant had no choice but to testify on his own behalf.

15/ Prosecution likewise commented upon this conviction in its closing argument (Tr. 96b). The trial court instructed the jury regarding this prior conviction (Tr. 119-120b).

16/ Luck v. U.S., 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

In such circumstances -- when the defendant is the only one who can give his version of the facts -- the prejudicial effect of admitting prior convictions for impeachment purposes is even greater. See U.S. v. Simpson, ___ U.S. App. D. C. ___, ___ F.2d ___ (November 17, 1970, slip. op. at 7-8, opinion of Fahy, S.J., concurring in part and dissenting in part).

The extent of prejudice that the prior conviction creates on the issue of present guilt is not to be easily overlooked. "(E)vidence of such a prior conviction cannot be said to be limited in its impact on a jury to the defendant's credibility. Rather it inevitably influences the jury generally to the effect that he is again guilty as he had been before." U.S. v. Simpson, supra at 6-7 (Fahy, S.J., concurring in part and dissenting in part).

Particularly in cases such as this, which charge the defendant with the commission of sex-related crimes, extraordinary care must be taken to insure that defendant is not unduly prejudiced. This is most true when only the defendant can defend himself by his own testimony; when the only issue involved is credibility -- determining truth from contrary versions of the facts given by the complaining witnesses and defendant. "Rape," as Lord Hale aptly observed three centuries ago, "is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent."[17/] "Sexual cases are particularly subject to the danger of deliberately false charges.

17/ I Pleas of the Crown 633, 635 (1680).

resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."[18]

In the present case, appellant's onerous task of defending himself from charges of rape and sodomy were made prejudicially difficult by the admission of appellant's conviction of interstate transportation of forged securities in 1965 for purposes of impeaching appellant's testimony -- the only testimony which could save him from "an accusation easily to be made...[but] harder to be defended by the party accused;"[19] from charges "particularly subject to the danger of deliberately false charges."[20]

18/ Glanville Williams, "Corroboration -- Sexual Cases," 1962 Criminal L. Rev. 662 (emphasis added).

19/ I Pleas to the Crown, supra at 635.

20/ Williams, supra.

III. APPELLANT WAS CONSTITUTIONALLY ENTITLED TO A JURY INSTRUCTION TO THE EFFECT THAT CONSENT IS A DEFENSE TO A CHARGE OF SODOMY.

[The Court's attention is directed to the following pages in the transcript: 43-44b, 68-70b; 80-81b; 128-131b; and to defense counsel's requested instruction on the question of consent as a defense to sodomy, which is found in the Record.]

As made clear at trial, appellant admitted that he had engaged in the acts of sodomy for which he was charged. His sole defense to these charges was consent -- that the two female complainants voluntarily consented to engage in the acts. The sodomy statute[21] makes no explicit exception for consensual acts. Defense counsel did, however, request a jury instruction to the effect that consent would be a defense to a charge of sodomy (Tr. 43-44b; 68-70b; 80-81b),[22] but the trial court denied the request (Tr. 81b), and the instruction as given made no mention whatsoever of consent as a defense (Tr. 128-131b).

We submit that it is unconstitutional to impose criminal sanctions against sexual acts taking place in private between

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21/ 22 D. C. Code §3502.

22/ The requested instruction appears in the record on appeal.

consenting adults, married or unmarried.[23] Therefore, appellant could not constitutionally be convicted of the crime of sodomy if the acts in question occurred in private[24] between adults[25] who voluntarily consented thereto, and the failure to instruct the jury that consent is a defense was error of the first magnitude.

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[23] At the non-constitutional level, two decisions are worthy of note here. The first, McGuinn v. U.S., 89 U.S. App. D.C. 193, 191 F.2d 477 (1951), involved a conviction of both rape and sodomy. On appeal, the defendant alleged that certain of his proposed instructions (prayers) were improperly denied. In affirming the conviction, this Court stated: "Prayers number nine and nine amended dealt with consent. The court properly instructed the jury 'there must be an absence of consent unless the consent is induced by putting the woman in fear of grave bodily harm or death or by the exercise of actual force against her person.'" (191 F.2d at 479; emphasis added). Thus, it may well be that this Circuit has already declared, in effect, that consent is a defense to sodomy and that the jury must so be instructed. However, the opinion is ambiguous to the extent that it is not clear whether the instruction mentioned was in reference to the rape charge, the sodomy charge, or both.

The second case of interest, Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Munic. Ct. App. 1960), dealt with a criminal charge pursuant to 22 D. C. Code §1112(a), which makes it an offense to commit a "lewd, obscene, or indecent act in the District of Columbia." As applied to an act of homosexuality occurring in private between consenting adults, the court, in construing that statute, held: "(I)t is our opinion that the present law was not designed or intended to apply to an act committed in privacy in the presence of a single and consenting person," (163 A.2d at 559), despite the absence of an express exception in the statute for such acts. We are aware of no reported cases dealing with the question of the application of the D. C. sodomy statute (22 D. C. Code §3502) to private, consensual acts between adults. We suggest, therefore, that, without reaching the constitutional question presented herein, this Court may, as a matter of statutory construction, conclude that the D. C. sodomy statute does not apply to such consensual acts.

[24] The acts here in question occurred in private (Tr. 68a).

[25] Appellant was 25 and the two female complainants were both 18 at the time (Tr. 54a, 105a).

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court held that it was an unconstitutional interference with the right of privacy for the state to forbid the use of contraceptive devices by married couples. While it has not yet been held that the constitutional right of privacy precludes proscription of private acts of sodomy between unmarried consenting adults, the courts have held that private acts of sodomy between married consenting adults are constitutionally protected. Likewise, the courts have held that the right of privacy is not limited to privacy of the marital relationship.

In Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968), cert. denied 393 U.S. 847 (1968), the court, on a habeas corpus petition, vacated the guilty plea of a defendant charged by his wife with sodomy, where he had been allowed to waive his right to counsel and plead guilty, without being informed that there was a substantial question as to whether acts performed by married people with mutual consent could constitutionally be prohibited by the state. The Court stated: "The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty" (394 F.2d at 875).

Likewise, a three-judge district court in Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Texas 1970), held that a state sodomy statute was unconstitutionally overbroad insofar as it applies to private, consensual acts of married couples.

> Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is

> probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation (308 F. Supp. at 733).

Griswold, Cotner, and Buchanan should not be read, however, to mean that the constitutional right to privacy in sexual matters is limited to married persons. Nowhere in the Constitution does such a distinction exist. If married couples have a constitutionally protected right of privacy, then it is equally evident that unmarried persons also possess this same right of privacy. As the court said in Henley v. Wise, 303 F. Supp. 62, 67 (N.D. Ind. 1969): "While only the right to marital privacy is covered by Cotner and Griswold, it is clear that this right stems from the greater right to individual privacy," (emphasis added).[26/] Likewise, in Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966), where a statute prohibiting private nudist colonies was

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[26/] The court there held unconstitutional a pornography statute as it applied to private possession without an intent to distribute. "(T)he statute prohibits possession by any individual and thereby violates the right to privacy found in Griswold...." (303 F. Supp. at 67) See also, Stanley v. Georgia, 394 U.S. 557 (1969); Baird v. Eisenstadt, 429 F.2d 1398, 1400, n.2 (1st Cir. 1970); and Harris v. State, 457 P.2d 638 (Alaska 1969), where, in affirming a sodomy conviction where there was no consent, the court stated: "If the case at bar concerned private consensual conduct with no visible impact upon other persons, at least some of us might perceive a right to privacy claim as one of the penumbral emanations of the Bill of Rights and the 14th Amendment Due Process Clause or simply as one of the unenumerated rights guaranteed by the 9th Amendment" (457 P.2d at 648).

held unconstitutional, Senior Judge Darr said in his concurring opinion:

> None who make it a point to keep current with United States Supreme Court rulings, particularly recent ones, could have any doubt that the right of privacy is now constitutionally protected. That Court has wisely recognized that the Constitution creates a "right of privacy, no less important than any other right carefully and particularly reserved to the people" [citing Griswold] .... I am convinced that the operators of nudist colonies and persons engaged in nudist practices are constitutionally entitled to the right of privacy, which is a liberty protected by the Due Process Clause of the Fourteenth Amendment.... (252 F. Supp. at 848).

The fundamental personal right of privacy is protected by the Constitution, then, for all persons. The Supreme Court has made it perfectly clear that when fundamental personal rights are involved, only when a "compelling state interest" exists will the state be allowed to interfere with that right. See, e.g., Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Button, 371 U.S. 415, 438 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Elfbrandt v. Russell, 384 U.S. 11 (1966).

Appellant contends that private, consensual sex acts between adults are not affected with a sufficient compelling state interest to be a legitimate subject matter for the exercise of the police power of the state. Appellant readily admits that the public has certain legitimate interests in this area, such as acts involving minors (or other incompetents) or unwilling participants, and acts taking place in public. This position can best be summed up by reference to the following Comment to the Model Penal Code:

> Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors or public offense, is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.... Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others (Model Penal Code §207.5,[27] Comment at 278-279 (Tent. Draft. No. 4, 1955)).

It is undisputed that the acts of sodomy in question here took place in private between adults (see Notes 24 and 25, supra). The only dispute was whether or not the two female complainants consented. This was appellant's sole defense to the charges of sodomy. Since acts of sodomy privately taking place between consenting adults are constitutionally protected activity, the trial court's failure to instruct the jury that consent would be a defense to the charges of sodomy constituted prejudicial error.

27/ See also, Note, "Private Consensual Adult Behavior: The Requirement of Harm to Others," 14 UCLA L. Rev. 581 (1967); Schram, "A Reasoned Approach to the Reform of Sex Offense Legislation," 1 Prospectus: A Journal of Law Reform (Univ. Mich. Law School) 139 (1968); Note, "Sodomy - Crime or Sin?" 12 U. Fla. L. Rev. 83 (1959); Note, "Private Consensual Homosexual Behavior: The Crime and Its Enforcement," 70 Yale L. J. 623 (1961). Furthermore, to the extent that the law, in regulating private, consensual adult sex activities, is trying to enforce religious, rather than secular, concerns, it is an unconstitutional violation of the First Amendment establishment of religion clause.

CONCLUSION

For the foregoing reasons, the jury verdict should be set aside and appellant acquitted, or, alternatively, granted a new trial.

Respectfully submitted,

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SUPPLEMENT TO BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,568-9

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN H. BROSKY,

Appellant.

ON APPEAL FROM A CRIMINAL CONVICTION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

George H. Cohen
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Attorney for Appellant
(Appointed by this Court)

A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE JURY LISTS FROM WHICH APPELLANT'S JURY PANEL WAS SELECTED WERE IMPERMISSIBLY OVERWEIGHTED WITH WOMEN.

[The Court's attention is directed to the following pages in the Transcript: 12-15a; 11s; 18s]*

As we have shown the jury's primary task in this trial of sex-related offenses was to determine whom to believe -- the testimony of the two female complainants or the testimony of the male defendant.

Appellant's court-appointed trial counsel pointed out the delicate nature of this sex offense trial when he brought to the trial court's attention the fact that the jury panel from which appellant's jury was to be selected was made up of twenty-three (23) women out of a total of thirty (30), i.e. 77% (Tr. 13-14a). 1/ Counsel moved to strike the panel as being unrepresentative of the community (Tr. 13a), but his motion was denied (Tr. 14a).

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* The letter "s" follows page references to the Transcript of the voir dire examination of June 29, 1970, which was transcribed separately from the remainder of the trial transcript.

1/ An additional ten (10) veniremen were subsequently called, seven (7) of whom were women (Tr. 11s, 18s). The jury as finally constituted consisted of eight women and four men; twenty-nine (29) veniremen were called before the jury was finally selected -- twenty-three (23) women and six (6) men; defense counsel utilized all twelve of his preemptory challenges (the trial court granted him an additional two) on women, in an effort to secure additional male jurors

It is, of course, well settled that the Sixth Amendment to the Constitution "requires jury selection systems to draw their jurors from a fair cross-section of the community." U.S. v. Brickey, 426 F.2d 680, 683 (8th Cir. 1970); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). "(T)here must not be any systematic, intentional or negligent exclusion of persons or groups." 426 F.2d at 683. As the Fifth Circuit recently stated:

> Good faith, or lack of an improper motive, is not a defense to the failure of jury board members to discharge the affirmative constitutional duties cast upon them... It was not necessary that there be shown conscious or intentional failure of Jury Board members to carry out the duties of their office, or that they consciously or intentionally discriminated or acted from ill will or evil motives, or that they lacked good faith.

Salary v. Wilson, 415 F.2d 467, 472 (1969).

We recognize that no hearing was held in the court below to determine whether the jury lists as a whole likewise reflect a gross disproportion of female members, or to determine how in fact such lists are compiled. 2/ However, in light of the disproportionately female weighted panel from which appellants jury was selected, we feel a substantial question exists as to

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1/cont) (only one male was called in the original twelve selections); the prosecution utilized five preemptory challenges -- two on men and three on women (Tr. 29-34s).

2/ As noted, the trial judge denied defense counsel's motion to strike the panel (Tr. 14a); he further deflected counsel's

whether, innocently or by design, males are excluded from the jury lists to an impermissible degree, and that, therefore, appellant ought to be afforded a full hearing below at which these questions can be explored.

This claim is not frivolous; to the contrary it is of a very serious nature. For example, the Supreme Court recently held that constitutional problems were raised when blacks comprised 37% of a jury list in a community where they constituted 60% of the population. Turner v. Fouche, 396 U.S. 346 (1970). 3/ See also, State of Georgia v. Birdsong, 428 F.2d 1223, 1224 (5th Cir. 1970); 4/ Salary v. Wilson, supra at 472.

2/ (cont., objections with the statement, "This is the process of selection," (Tr. 18s), to which trial counsel responded, "I think that there is something wrong with it. Note my exception" (Ibid).

3/ The Court said at 359:

> "The undisputed fact was that Negroes composed only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain in a random selection. In the absence of a countervailing explanation by the appellees, we cannot say that the underrepresentation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees" (emphasis added).

4/ "It is clear that if the allegations in the petition for removal correctly depict the composition of the traverse jury list in Fulton County, such jury lists fail to satisfy

The seriousness of this claim that appellant's constitutional right to a jury fairly representative of the community as a whole is further highlighted, as noted, by the fact that he was tried for serious sex offenses -- rape and sodomy. In Jackson v. Morrow, 404 F.2d 903, 904 (5th Cir. 1968), a similar problem was recognized:

> (T)he remark is warranted that in a claim by Negroes against white police officers for police brutality and a defense of accidental injuries resulting from restrained efforts to subdue recalcitrant, intoxicated persons, the resolution of this swearing match imperatively called- as do all trials for that matter for a jury free of discriminatory exclusions (emphasis added).

So too, it is evident that here the jury's problem was to resolve a "swearing match" between the sexes over the conduct of sexual matters,wherein the sympathies and experiences of the individual jurors is logically likely to lie with their respective sexes.

We feel, therefore, that this Court, whether to insure Constitutional conformity or in the exercise of its supervisory powers, should remand this case to afford appellant

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4/(cont), constitutional requirements that such lists represent a reasonable cross section of the community." 428 F.2d at 1224. The petition alleged that blacks made up one-third of the registered voters and only 12% of the jury list members.

a full opportunity to ascertain whether impermissible factors enter into the actual jury list selection process, resulting in a gross disproportion of female jury list members of the nature evidenced by appellant's particular panel.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,568 and 24,569

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN H. BROSKY, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney

JOHN A. TERRY,
JAMES L. LYONS,
DANIEL J. BERNSTEIN,
Assistants United States Attorneys

Cr. No. 1673-69

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

420-396—71——1

OTHER REFERENCES

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether this case should be remanded to the trial court for an evidentiary hearing to determine if the statutory method by which jurors are selected for jury service in the District of Columbia is unconstitutional?

2. Whether the trial judge abused his discretion in allowing the Government to impeach appellant with a four-year-old conviction for interstate transportation of forged securities?

3. Whether it was error for the trial judge to give the *Allen* charge to a deadlocked jury?

4. Whether the trial judge erred in refusing appellant's request to instruct the jury that consent is a defense to sodomy?

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*This case has not previously been before this court?

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,568 and 24,569

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN H. BROSKY, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

By a six-count indictment filed October 15, 1969, appellant was charged with rape while armed (22 D.C. Code §§ 2801 and 3202), rape (22 D.C. Code § 3202), two counts of sodomy (22 D.C. Code § 3502), and two counts of assault with a dangerous weapon (22 D.C. Code § 502). Trial was held on June 29 and 30 and July 1, 1970, before the Honorable John Lewis Smith, Jr., sitting with a jury, and appellant was found guilty on all counts (except count two (rape), which the jury had been instructed to disregard upon a finding of guilty on count one (rape while armed)). On July 30, 1970, appellant was sentenced to five to twenty years for rape while armed, three to ten years for each count of sodomy, and three to ten years for each count of assault with a dangerous weapon, the sentences to run concurrently. These appeals followed.[1]

[1] Two separate notices of appeal were filed by appellant in the District Court. On July 21, 1970, after trial but before sentence, appellant filed a notice of appeal *pro se* from the court's denial of a prior motion, also *pro se*, for judgment of aquittal. Then on July 31, 1970, the date of his sentence, appellant filed a notice of appeal from the judgment of conviction.

The Offense

At 11:00 p.m. on August 26, 1969, eighteen-year-old Carla Allensworth and Jean Ayers were sitting together in a booth in the Grog and Tankard Restaurant at 2408 Wisconsin Avenue, N.W. They had left their respective homes in Vienna, Virginia, earlier in the evening and had arrived at the restaurant around 9:00.[2] One Clifford Finnegan introduced himself to the girls and joined them in their booth. Shortly thereafter, another man approached their booth and handed Miss Allensworth a business card on which was inscribed "Bob White Buick—John Brosky—Sales Representative" (Tr. Vol. I 26, 91). On the back of the card in ink was written "Do you come alone or are you together. And if you are together, I would like to take you for a ride, and then come back here and have a drink" (Tr. Vol. I 91). The girls ignored the card, and Brosky went back to his table. A waitress then served the girls two unsolicited beers and told the girls that Mr. Brosky would pay for them. Brosky soon returned to the booth and joined Finnegan and the two girls. After apoligizing for the card, Brosky turned the conversation to automobiles. Finnegan excused himself and left. Miss Allensworth stated that she had her heart set on buying a Corvette. Brosky offered to take the girls up the street to the Buick showroom where on display was a Buick Opel, a car similar to a Corvette. The girls declined his invitation.

At midnight the girls left the restaurant by themselves. Brosky followed them outside and repeated his invitation. Again the girls rejected his offer. Miss Ayers approached a

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[2] The girls had driven to the restaurant in Miss Ayers' car. The restaurant was described as a "nice place" (Tr. Vol. I 57) where people of all ages come to eat dinner and drink beer (Tr. Vol. I 105–106), "a neighborhood bar" but not a "pick-up bar" (Tr. Vol. I 135). Both girls lived with their parents in Vienna and had been friends since kindergarten. On the day of the offense Miss Allensworth was attending the Washington School for Secretaries, and Miss Ayers was employed as a dental assistant (Tr. Vol. I 21, 88).

"Tr. Vol. I" refers to the transcript of that portion of the trial held on June 29 and 30; "Tr. Vol. I Supp." refers to the transcript of the voir dire; and "Tr. Vol. II" refers to the transcript of that portion of the trial held on June 30 (afternoon) and July 1.

public phone booth intending to call her mother.[3] Brosky suggested that they could save a dime and avoid the street noise by calling from a phone in his office. The girls relented and walked with Brosky the half-block to the Bob White showroom. As Miss Ayers used the phone in an office, Miss Allensworth looked at an Opel in the darkened showroom. Brosky then suggested to Carla Allensworth that she could look at a diagram of the Opel in another room. As they entered a back room, Miss Allensworth picked up the diagram, but suddenly Brosky placed his hand around her mouth and pushed her to the floor and at the same time threatened to kill her if she screamed.

Jean Ayers, in the interim, wondering where her girl friend could be, observed a light under a door and upon opening the door saw her friend struggling with Brosky on the floor. Brosky immediately jumped up, pulled Miss Ayers into the room and closed the door. Carla Allensworth screamed, and Miss Ayers pleaded with their assailant to leave them alone. Brosky retorted, "Shut up and take off your clothes, don't argue with me" (Tr. Vol. I 32, 95). Miss Ayers grabbed a pair of garden hedge clippers which had been leaning against the wall. Immediately Brosky lunged at Miss Ayers, and after a short struggle he managed to take the clippers from her. However, during the struggle Miss Allensworth, who had come to the aid of her friend, ran her fingernails down the side of Brosky's face. Brosky then pushed Carla Allensworth against a wall, and while pointing the now opened shears at the two frightened teenage girls, he threatened to kill them if they refused to comply with his demands (Tr. Vol. I 33, 95). On the threat of death, the girls finally obeyed his repeated demands to disrobe.

Making both nude girls lie on the floor face down, Brosky, now clad only in a T-shirt, told Miss Ayers to get up on her knees. Then, holding her by the nape of the neck, he ordered her to "suck him" (Tr. Vol. I 96). He placed his penis in Jean Ayers' mouth and then ordered Miss Allensworth to perform the same act. She too complied—unwillingly—with his demand, but suddenly he pushed her away and exclaimed, "She bit me"

[3] Before leaving the restaurant, Miss Allensworth had already called her mother to say that she would be home shortly and told her not to worry (Tr. Vo. I 29–30, 93).

(Tr. Vol. I 35). Jean Ayers looked at her girl friend and saw blood around her mouth. At the same time blood was dripping to the floor from Brosky's sexual organ (Tr. Vol. II 59–60). Although Miss Ayers started crying and held her stomach, complaining that she was ill, Brosky was preoccupied for the moment with the more pressing matter of his injured penis. Using Miss Ayers' dress, which had been lying on a table, he tended his wound. Then, undaunted, he ordered Jean Ayers to commit an act of cunnilingus on her girl friend. As Miss Ayers unwillingly placed her tongue in Carla Allensworth's vagina, Brosky demanded, "Get her wet. Put it in deeper * * * deeper" (Tr. Vol. I 96). Brosky then ordered Miss Ayers again to commit oral sodomy upon him. He told her that she had better excite him so that he could have sex with Carla Allensworth "or else" (Tr. Vol. I 36). He then made Jean Ayers "lick [Miss Allensworth's] ass" and ordered her to "get her wet" (Tr. Vol. I. 37, 97). Still crying, Miss Ayers complied. Brosky then had both forced sexual intercourse and rectal sodomy with Miss Allensworth. Suddenly his body went "limp" (Tr. Vol. I 37), and the two girls were then allowed to dress. He accompanied them to their parked car and left. The girls stopped the first policeman they encountered and related to him the gruesome episode.

The Trial

Carla Allensworth and Jean Ayers both positively identified appellant as the perpetrator of the various sex acts (Tr. Vol. I 50, 103).

Officer Jerome Roach testified that at around 1:05 a.m. on August 27, 1969, while on routine patrol in his scout car in Georgetown, he heard a car horn and also heard screams and sobs emanating from inside the same car. As Roach approached, he heard the driver, Carla Allensworth, repeatedly scream "God help me, please help me." She was in an hysterical condition, sobbing and crying. On her thigh appeared to be blood. Her face was all red (Tr. Vol. I 167). After obtaining a brief description of the incident, Roach flashed a lookout and then proceeded with the girls to the Seventh Precinct, where he immediately called the Sex Squad.

Detective Vincent Incavo of the Sex Squad responded to the Seventh Precinct and interviewed the two girls. He then went with them back to the scene of the crime and recovered from the room the garden hedge shears and at the same time noticed on the floor what appeared to be spots of blood. The girls were then taken to D.C. General Hospital and examined (Tr. Vol. I 170–188).

Detective Francis E. Baker, Jr., of the Sex Squad testified that he arrested appellant on a rape warrant at 8:00 p.m. on August 27, 1969, at the Bob White Buick dealership at 624 H Street, N.E. Incident to the arrest, Baker seized from appellant his boxer-type undershorts.[4] When appellant dropped his shorts, Baker noticed a small scab and a puncture "about the size of an eraser on a pencil" (Tr. Vol. I 191) on the head section of appellant's penis. He also observed what appeared to be fresh scratch marks on appellant's cheek and neck (Tr. Vol. I 190–191).

Counsel stipulated that if Dr. Michael Hitchcock were called, he would testify that during his examination of Carla Allensworth in the early morning hours of August 27, he noticed bruises on her arm and wrist but found no blood or bruises on her rectum or blood in her vaginal area (Tr. Vol. I 198–199). It was further stipulated that if Special Agent Frank Silas, a serology expert with the F.B.I., were called, he would testify that spermatozoa were found on the panties worn by Carla Allensworth during the sexual attack. In addition, group O human blood was found on the dress worn by Jean Ayers during the assault and also on the undershorts seized from appellant at the time of his arrest. He would further testify that the results of an examination showed that appellant had group O blood (Tr. Vol. I 199–201).

Appellant testified in his own behalf. He stated that while he was showing Jean Ayers the diagram in the room at Bob White Buick, Carla Allensworth walked into the room, picked up the clippers, pointed them at appellant and demanded $45.

[4] The shorts seized from appellant at the time of his arrest were not the same shorts he wore during the offense.

Appellant grabbed the clippers, and during the struggle the clippers scratched his face. When appellant put his hand on the telephone to call the police, both girls said, "Please don't get us in trouble" (Tr. Vol. II 31–33). The girls then offered to perform certain acts of sex if appellant would not call the police. They undressed, and appellant dropped his pants. According to appellant's testimony, Miss Allensworth voluntarily committed oral sodomy upon appellant, but then she bit his penis. After he wiped his penis on Jean Ayers' dress, Miss Ayers voluntarily committed oral sodomy on him. Appellant attempted to have rectal sodomy with Carla Allensworth but failed to accomplish penetration. He then attempted to have sexual intercourse with Miss Allensworth but was not sure if there was penetration. Carla Allensworth consented to both these sexual acts. Appellant and the girls then left the building and went to Jean Ayers' parked car. Since Miss Ayers had been complaining of stomach pains, he directed them to a nearby hospital. The girls then drove off. Appellant explained that the blood on his shorts were caused by complications from a hemorrhoid condition (Tr. Vol. II 28–68).[5]

ARGUMENT

I. The statutory method by which the jurors were selected for jury service is not constitutionally defective.

(Tr. Vol. I Supp. 13–14, 15, 18; Vol. II 3–10)

Appellant contends that since three-fourths of the veniremen on the jury panel were females, a substantial question exists as to whether males are excluded from the jury lists to an impermissible degree, intentionally, negligently, or systematically, resulting in an array of jurors which did not represent a cross-section of the community. Consequently, appellant argues, he was denied his right to an impartial jury as guaranteed by the Sixth Amendment. This argument has no merit.

[5] Both Patricia Whaley, the waitress at the Grog and Tankard Restaurant, and Clifford Finnegan testified to the events at the restaurant (Tr. Vol. I 127–139, 204–212; Tr. Vol. II 3–10). While there were some minor inconsistencies between their individual versions of what transpired, as well as between the versions given by the two complainants and appellant, for the purpose of this appeal it is not necessary to detail them.

The record reveals that prior to the voir dire examination of the jury panel, appellant's trial counsel moved to strike the entire panel. He argued that since the panel of thirty veniremen consisted of twenty-three women, it was not representative of the community; he also asserted that because of the nature of the charge and a woman's inherent sympathies, appellant could not receive a fair trial (Tr. Vol. I Supp. 13–14). The court denied appellant's motion but ordered an additional panel to be sent to the courtroom (Tr. Vol. I Supp. 15, 18). The second panel (consisting of ten veniremen) soon arrived, and the following colloquy occurred:

> Mr. ROSEN [defense counsel]: Your Honor, I know that we have to get on with the case, but I want this Court to note that seven out of ten are women. This is the problem that we face. This is something that——
>
> The COURT: This is the process of selection.
>
> Mr. ROSEN: I think that there is something wrong with it. Note my exception. (Tr. Vol. I Supp. 18.)

We submit initially that appellant's objection at the trial level was ambiguous at best. He did not move to quash the indictment, challeging the array of petit jurors because of an alleged intentional and systematic exclusion of men from the panel. *See Ballard* v. *United States*, 329 U.S. 187, 190 (1946); *Pope* v. *United States*, 372 F. 2d 710, 721–724 (8th Cir. 1967) (*en banc*), *rev'd on other grounds*, 392 U.S. 651 (1968); 28 U.S.C. § 1867 (a). Nor did he request that the court hold an evidentiary hearing to determine if the statutory method of selecting jurors in this jurisdiction, *see* 28 U.S.C. §§ 1861–1866, was constitutionally impermissible. *See United States* v. *Haywood*, 289 F. Supp. 479 (D.D.C. 1968); *United States* v. *Ware*, 237 F. Supp. 849 (D.D.C. 1964), *aff'd*, 123 U.S. App. D.C. 34, 356 F. 2d 787, *cert. denied*, 383 U.S. 919 (1965). Therefore, since he failed to make a "clear objection to alert the trial judge to the problem, we do not think the record has been adequately preserved on this issue." *United States* v. *McCray*, —— U.S. App. D.C. ——, 433 F. 2d 1173, 1175 n.1.

In addition, appellant's attack on the statutory method by which jurors are selected for jury service in the District of Columbia is an issue which this Court has previously con-

sidered and found deficient as a basis for relief.[6] *Baker* v. *United States*, 131 U.S. App. D.C. 7, 13 n.14, 401 F. 2d 958, 964 n.14 (1968); *Ware, supra; see Dennis* v. *United States*, 339 U.S. 162 (1950); *Frazier* v. *United States*, 335 U.S. 497 (1949); *United States* v. *Haywood, supra.* This Court held in *Baker, supra:*

> We find nothing in the record to indicate that a specific group or class was intentionally or systematically[7] excluded by the jury commissioners or that the array was an unrepresentative and partial cross-section of the community. 131 U.S. App. D.C. at 13 n.14, 401 F. 2d at 964 n.14.

Since appellant has waived this issue on appeal by his failure to make a proper objection below, and since this Court has previously made a thorough inquiry into the statutory method of jury selection in the District of Columbia and has found no constitutional defects, we submit that appellant's contention is without merit.

II. The trial judge did not err in allowing the Government to impeach appellant with a four-year old conviction for interstate transportation of forged securities.

(Tr. Vol. I 8–11; Vol. II 65)

Appellant contends that the trial judge abused his discretion under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965), in permitting the Government to impeach his credibility by means of a prior criminal conviction. It appears from the record, however, that the trial court fully complied with the recommendations of this Court in *Gordon* v. *United*

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[6] Appellant on appeal does not specifically attack the composition of the jury panel, since the panel itself need not be representative of the community. *See Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1945). Instead he requests this Court to remand the case to the trial court for an evidentiary hearing to determine if the jury commissioner's method of preparing the master jurors list insures that the list of prospective jurors constitutes a cross-section of the community.

[7] Appellant's argument that the *negligent* exclusion of persons or groups from jury service requires reversal of his convictions has been rejected by this Court. *Ware* v. *United States*, 123 U.S. App. D.C. 34, 37–38, 356 F. 2d 787, 790–791, *cert. denied*, 383 U.S. 915 (1965).

States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967), *cert. denied*, 390 U.S. 1029 (1968). As *Gordon* suggested, the trial judge held a hearing wherein he was informed by the Government that appellant had been convicted of petit larceny in 1964 and interstate transportation of forged securities in 1965. Appellant's trial counsel agreed with the court that the sole issue was one of credibility. He also informed the court that appellant would testify. The trial judge ruled that since the probative value of the interstate transportation of forged securities conviction on the issue of credibility outweighed its prejudicial effect, the Government would be permitted to impeach appellant with this conviction, but would be precluded from using the more remote larceny conviction (Tr. Vol. I 8–11). Appellant subsequently testified and was so impeached (Tr. Vol. II 65).

Appellant does not contend that the conviction was too remote or that it did not relate to veracity, but instead he claims that the prejudicial effect is much greater when the accused is charged with a sex crime, since such accusations are easily made and hard to defend. This Court, however, has never precluded the use of *Luck* impeachment in sex cases. *See, e.g., Gass* v. *United States*, 135 U.S. App. D.C. 11, 416 F. 2d 767 (1969). On the contrary, this is exactly the type of case where the *Luck* impeachment would enhance "the integrity of the truth seeking process." *Weaver* v. *United States*, 133 U.S. App. D.C. 66, 67, 408 F. 2d 1269, 1270 (1969). In addition, appellant's testimony afforded the jury an opportunity to consider his version of the events and observe his demeanor, thus mitigating the effect of any possible prejudice by admission of the prior conviction. We submit, therefore, that on this record the trial judge's ruling cannot be termed an abuse of discretion.

III. The *Allen* charge was properly given.

(Tr. Vol. II 135–139)

In the case at bar the *Allen*[5] charge given by the court to the deadlocked jury follows verbatim the language of the *Allen* instruction appearing in the "red book." JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE

[5] *Allen* v. *United States*, 164 U.S. 492 (1896).

DISTRICT OF COLUMBIA, No. 41 (1966). Appellant does not contend that this standard instruction was *per se* coercive, and understandably so, since the form of the court's *Allen* instruction has heretofore been expressly approved in this jurisdiction. *E.g., United States* v. *Wells,* D.C. Cir. No. 23,826, decided February 10, 1971 (unpublished opinion); *Fulwood* v. *United States,* 125 U.S. App. D.C. 183, 186 n.5, 369 F. 2d 960, 963 n.5 (1966), *cert. denied,* 387 U.S. 934 (1967); *Moore* v. *United States,* 120 U.S. App. D.C. 205, 206, 345 F. 2d 97, 98 (1965). Appellant, however, contends that the charge was coercive under the particular circumstances of this case.

In the case at bar the jury left the courtroom to deliberate at 10:24 a.m. on July 1, 1970. At 3:50 that afternoon the jury returned to the courtroom and indicated that they were deadlocked on four of the six counts, having reached a verdict on two counts of the indictment. Over objection of appellant's trial counsel the standard *Allen* charge was given. The jury left the courtroom at 3:54 p.m. to resume their deliberations and at 4:25 p.m. returned with a unanimous verdict of guilty on all counts (Tr. Vol. II 135–139).

The *Allen* charge in this case was neither augmented by a single coercive communication from judge to jury nor amplified by any overbearing or undesirable comments by the trial judge. *Cf. Wells, supra.*[9] We submit, therefore, without going beyond this record, that there were no unique circumstances in this case which would have caused the *Allen* charge to be unduly coercive.[10]

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[9] Coercion may appear when the trial judge indicates to the jury that they must reach a verdict at all costs, or where the jury is told that they must avoid the possibility of a retrial, or where the trial judge makes disparaging remarks with respect to those jurors who remained in the minority. *See Wells, supra,* slip op. at 5, and cases cited therein. The record in the case at bar is devoid of any such language by the trial judge (Tr. Vol. II 135–139).

[10] Appellant urges that the trial judge in giving the *Allen* charge violated this Court's mandate in *United States* v. *Johnson,* 139 U.S. App. D.C. 193, 432 F. 2d 626 (1970). The *Johnson* Court, however, upheld the standard *Allen* charge, merely indicating in dicta that there was a problem with the majority-minority language in the *Allen* charge which should be considered by this Court *en banc.* Thus, until this Court *en banc* overrules such cases

IV. The trial court did not err in refusing to instruct the jury that consent is a defense to sodomy.

(Tr. Vol. II 115–132)

Appellant contends that since consent is a defense to sodomy when the sexual acts take place in private between consenting non-married adults, it was error for the trial judge to refuse to instruct on this defense. We must disagree.

Every state has laws which, in promoting the health, safety, and general welfare of its people, *see Near* v. *Minnesota*, 283 U.S. 697 (1931), have imposed criminal sanctions against varieties of nonprocreative sexual behaviors. *See* 22 D.C. Code § 3502; Note, *Sodomy Statutes—A Need for Change*, 13 S.D.L. REV. 384 (1968), and cases cited therein; 81 C.J.S. *Sodomy* § 3 (1953). Although most sodomy prosecutions involve the element of force or a complainant who is a minor, the prevailing view today is that consensual nonprocreative sexual conduct between non-married adults in private nevertheless constitutes sodomy.[11] *See State* v. *Schmit*, 273 Minn. 78, ——, 139 N.W. 2d 800, 809 (1966); *People* v. *Boud*, 136 Cal. App. 2d 572, 289 P. 2d 44 (1955); N.Y. PENAL LAW § 130.38 (1967); Note, 13 S.D.L. REV., *supra* at 393; 81 C.J.S., *supra* at 372.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that it was an unconstitutional interference with the right to privacy for a state to forbid the use of contraceptive devices by married couples. However, since *Griswold* no court has yet extended the constitutional "penumbra" to cover acts of sodomy committed in private by non-married adults. In *Travers* v. *Paton*, 261 F. Supp. 110 (D. Conn. 1966),

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as *Johnson* and *Fulwood*, the standard unembellished *Allen* charge is a permissible instruction. The fact that the main issue in the instant case was one of "credibility of witnesses" provides no unique circumstance which would cause the *Allen* charge to be considered unduly coercive, for that is basically the issue in most cases.

[11] This Court has not previously decided this issue. *McGuinn* v. *United States*, 89 U.S. App. D.C. 193, 191 F. 2d 477 (1951), involved a conviction for sodomy and rape. In affirming the convictions, this Court held that the trial court properly instructed the jury on the defense of consent. Although it is not clear from the opinion, it is apparent after studying appellee's brief in *McGuinn* that the alleged error was directed solely to the rape count (appellee's brief in *McGuinn*, pp. 24–25).

the court refused to apply *Griswold* outside the marital context, stating:

> The several opinions written [in *Griswold*] are a studied effort to avoid the introduction into the Constitution of a mass of unwritten rights, and they emphasize and re-emphasize that it is the special nature of the marriage bond that makes so patently offensive state intrusion into the area 261 F. Supp. at 113.

Smayda v. *United States*, 352 F. 2d 251, 255–257 (9th Cir.), *cert. denied*, 382 U.S. 981 (1966), also restricts the application of *Griswold* in its holding that homosexuals committing acts of sodomy in a stall of a public rest room cannot validly claim any right to privacy. *But see Bielicki* v. *Superior Court*, 57 Cal. 2d 602, 371 P. 2d 288, 21 Cal. Rptr. 552 (1962). Other courts which have considered sodomy statutes and found invasions of privacy have limited their holdings to acts of sodomy between married couples. *See Buchanan* v. *Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970); *cf. Cotner* v. *Henry*, 394 F. 2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

In limiting this "right of privacy" to marriage-oriented relationships the various courts have no doubt considered the narrow holding in *Griswold*. We can appreciate their reluctance to extend *Griswold*, for as the Supreme Court itself stated:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. * * * Would we allow the police to search the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. * * * Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. 381 U.S. at 485–486.

In 1967 the state of New York revised its criminal statutes and adopted in part the recommendations of the American Law Institute in its Model Penal Code. However, the New York legislature specifically rejected the Model Penal Code's recom-

mendation [12] to repeal that part of the sodomy statute which dealt with acts between consenting adults.[13] *See* N.Y. PENAL LAWS § 130.38 (1967); Note, 13 S.D.L. REV., *supra* at 388–391.

Sodomy was an offense at common law and was codified as an offense in the District of Columbia in 1948. Act of June 9, 1948, ch. 428, 62 Stat. 34. We believe that there is a sufficient nexus between the state interest in protecting its citizens from moral decay and the state's exercise of its police powers by the passage of laws prohibiting what it considers immoral acts, such as sodomy. To construe this statute as appellant urges would interfere with a state's proper regulation of sexual misconduct.

Even if this Court finds that consent is a valid defense to acts of sodomy committed in private by consenting non-married adults, we submit that on the facts of this record the failure of the trial court to instruct on such a defense was harmless error. In finding appellant guilty of both rape and sodomy, the jury obviously rejected appellant's testimony that the two girls enticed him into committing the perverted sexual acts in consideration of his not reporting to the police their attempt to rob him of $45. Since the jury found a forcible rape, it seems inconceivable that they could have also found that during this attack the girls voluntarily consented to commit acts of sodomy. The mere fact that Carla Allensworth chose to bite appellant's penis during one act of oral sodomy precludes such a finding.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[12] MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955).

[13] Illinois is the only state which has recently by statute abolished criminal penalties for acts of sodomy which do not involve force or violence, exploitation of youth, or open and notorious conduct. ILL. REV. STAT. ch. 38, §§ 11–2 to 11–9 (1961). *See* Note, 13 S.D.L. REV., *supra* at 388–390.

U.S. GOVERNMENT PRINTING OFFICE: 1971

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,568-9

UNITED STATES OF AMERICA, Appellee, v. JOHN H. BROSKY, Appellant.

ON APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

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* Cases principally relied upon are marked with an asterik

I. COMMENT ON THE GOVERNMENT'S COUNTERSTATEMENT OF THE CASE.

We recognize that the pressing burdens on the Court do not permit it to read the entire transcripts of criminal trials in the courts below. Thus we went to great pains in our opening brief to set out the testimony as it developed in the trial below in as an objective and complete manner as possible within reasonable space limitations. We believe that a full reading of trial transcript would bear this out.

Normally we do not feel a need to respond in a reply brief to the appellee's counterstatement of the case. Given, however, what we feel to be an undue slanting of certain of the crucial facts as presented in the government's brief in this case, we are constrained to comment on at least the most serious of this editorializing.

The government's assertion (government brief p. 3) that the two complainants after leaving the Grog and Tankard, "relented" and accompanied appellant to the Bob White showroom can not withstand scrutiny. The testimony of both complainants was unequivocal that their accompaniement was fully voluntary on their part (Tr. 67-68a, 113a). Miss Ayers testified on cross-examination, for example, as follows:

> Q. You went voluntarily, isn't that a fact? In other words, he didn't use any force or any threats or weapons, or he didn't assault you or molest you

or strike you in anyway?

A. No, sir.

Q. You went voluntarily?

A. Yes, sir.

Q. Of your own free will?

A. Yes, sir. (Tr. 113a).

Furthermore, Miss Ayers also testified that, even prior to leaving the Grog and Tankard, Miss Allensworth did wish to accompany Grosky to the showroom and Miss Ayers was at that time undecided:

A. Then we went to the bathroom.

Q. All right, what happened then?

A. She said that he had been talking about what she could have put in a car and that he wanted to show her up at the Bob White place, and she wanted me to go up there. And I didn't want to, because I had to get home. But she wanted to go up. So, we hadn't made any decision about going up or not going up when we we both came out of the bathroom. We both knew that we had to get home. (Tr. 150-151a).

* * * *

Q. In other words, when you were with Miss Allensworth alone in the bathroom and you had this conversation, did she indicate to you that she wanted to go to the Buick showroom with Mr. Brosky?

A. Yes, sir. (Tr. 153a).

II. THE TRIAL COURT IMPROPERLY GAVE THE JURY THE ALLEN CHARGE.

In Appellant's opening brief (pp. 14-21), we argued that the use of the Allen charge by the trial court after the jury had deliberated for more than five hours was, under the circumstances of this case, so potentially coercive as to constitute prejudicial error.

The government argues that because the charge was given in its pure form, without augmentation, it was proper -- that because the language followed verbatim from the "red book," there were no "unique circumstances" causing the charge to be unduly coercive (government brief pp. 9-10).

But adherence to the "red book" charge does not put an end to this matter. In U.S. v. Johnson, ___ U.S. App. D. C. ___, 432 F.2d 626(1970), as here, an Allen charge was given which was substantially identical to the "red book," or pure Allen, instruction. Nevertheless, this Court pointed out that "Fulwood [in which this Court held that the Allen charge in its essentially pure form was not coercive per se] would not have foreclosed appellant from claiming that in the circumstances of this case... the charge did have coercive impact." 432 F.2d at 633.

Thus, it is not only when Allen-plus language is used that a finding of undue potential coercion may be found; rather, even when a pure unembellished Allen charge is given, the circumstances

surrounding a particular trial may necessitate a finding of coercion. 1/ We submit that the present case presents such circumstances.

1/ As one panel of this Court has stated, "the charge, even when unembellished by further exhortations, is 'potentially coercive'...." U.S. v. Thomas, ___ U.S. App. D. C. __, __ F. 2d__ (November 6, 1970, slip op. at 8, emphasis added), vacated en banc and rehearing en banc ordered (January 26, 1971, slip op.).

III. ADMISSION OF A PRIOR CONVICTION OF APPELLANT FOR IMPEACHMENT PURPOSES CONSTITUTED ERROR IN THE CIRCUMSTANCES OF THIS CASE.

As we noted in our opening brief (pp. 23-24), it has been recognized for centuries by eminent commentators that "sexual cases are particularly subject to the danger of false charges," and, therefore, the admission of a prior conviction to impeach the defendant in a trial of sex-related offenses has a particularly prejudicial effect, especially where, as here, the defendant can defend himself only by his own testimony to establish consent.

The government states in its brief (p. 9) that this Court "has never precluded the use of Luck impeachment in sex cases," citing the case of Gass v. U.S.[2] for support. In Gass, however, the defendant did not admit that the sex acts took place and defend on the ground of consent. Rather, he relied on an alibi defense and asserted that he had been someplace else at the time Furthermore, in Gass it was undisputed that an armed robbery also occurred at the scene. In such circumstances, it is much less likely that a sex charge would be fabricated by the complainant, than in the case where, as here, the complainants

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2/ 135 U.S. App. D. C. 11, 416 F. 2d 767(1969).

readily accompanied the defendant to a private setting late at night and where the defendant admits that the acts took place, but defends on ground of consent. In a case such as the present, the liklihood of deliberately false charges because of "a girl's refusal to admit that she consented to an act of which she is now ashamed"[3] is far greater. In such a case the admission of a prior conviction can have a fatally prejudicial impact.

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3 / Glanville Williams, "Corroboration -- Sexual Cases," 1962 Criminal L. Rev. 662.

IV. THE CONSTITUTIONAL RIGHT TO PRIVACY IN SEXUAL MATTERS IS NOT LIMITED TO THE MARRIAGE RELATIONSHIP.

The government goes to great lengths in its brief (pp. 11-12) to urge that the Constitutional right to privacy in sexual matters has been limited by the courts to the marriage relationship. An examination of recent court decisions applying the right of privacy rationale of Griswold [4/] reveals that such right is not limited to married persons, but extends equally to protect the private consensual sexual relationships between unmarried adults as well.

For example, in Mindel v. U.S. Civil Service Commission, 312 F. Supp. 485, 488 (N.D. Calif. 1970), the court, in granting summary judgment in favor of an unmarried postal clerk who had been fired because he was living with a woman to whom he was not married, succinctly stated: "Mindel's termination because of his private sex life violates the right to privacy guaranteed by the Ninth Amendment" (emphasis added). See also this Court's decision in Norton v. Macy, -- U. S. App. D. C. --, 417 F. 2d 1161(1969), holding that a federal civil service employee could not be discharged for engaging in private homosexual conduct. Citing Griswold and Stanley, [5/] inter alia, the Court said at 1164-1165:

4/ Griswold v. Connecticut, 381 U.S. 479(1965).

5/ Stanley v. Georgia, 394 U.S. 557(1969).

> The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections.
>
> * * * *
>
> (T)he notion that it could be an appropriate function of the federal bureacracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity.

Recent cases striking down abortion statutes also make clear that the constitutional right of privacy is not narrowly limited to married persons. In a case striking down the Texas abortion laws, a three-judge federal district court stated:

> On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. We agree.
>
> The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals.
>
> * * * *
>
> Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised.

Roe v. Wade, 314 F. Supp. 1217, 1221-1222 (N.D. Texas 1970), appeal docketed, 29 U.S.L.W. 3229 (No. 808) (emphasis added). Accord: Babbitz v. McCann, 310 F. Supp. 293, 299 (E.D. Wisc. 1970, three-judge court), appeal dismissed 39 U.S.L.W. 3144 (No. 297): U.S. v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969, Gesell, J.), appeal pending, 39 U.S.L.W.3019(No. 84): People v. Belous, 458 P. 2d 194, 199 (Calif. 1969).

See also the cases of Henley v. Wise, 303 F. Supp. 62, 67 (N.D. Ind. 1969), and Roberts v. Clement, 252 F. Supp. 835, 848 (E.D. Tenn. 1966, three-judge court, Darr, S.J., concurring), cited in Appellant's opening brief (pp. 28-29).

Furthermore, the cases cited by the government are of little precedential value here. Travers v. Paton (government brief pp. 11-12) did not deal with privacy in sexual matters at all, but rather with a claimed right of privacy relative to the use in a television documentary of a film of the plaintiff during his parole interview. Insofar as that decision indicates that Griswold is limited to the area of marital sex, it is dictum only. Smayda v. U.S. (government brief p. 12) is totally inapposite. There the defendants, convicted of homosexual conduct, challenged their conviction on the ground that police detection of their activity constituted an unreasonable search in violation of the Fourth Amendment. There was no assertion

made that they were engaged in constitutionally-protected activity. In addition, the court held that the acts had taken place in public. In Cotner v. Henry (government brief p. 12, Appellant's opening brief pp. 27-28), the court was not faced with the question of acts of sodomy by unmarried persons. The defendant in that case had been convicted of engaging in sodomous conduct with his wife, a conviction reversed by the Seventh Circuit. 6/

In sum, as most courts which have been faced with the question have recognized, the constitutional right of privacy which the Supreme Court acknowledged in Griswold, is not limited to the marriage relationship, but rather extends to all private, adult, consensual sexual activity. 7/

The right of privacy is a fundamental right which the Constitution guarantees will not be encroached by the state except upon showing of a compelling state interest. Roe v. Wade, supra; Babbitz v. McCann, supra; and cases cited at

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6/ Finally, the government relies on Buchanan v. Batchelor (government brief p. 12). There, the district court did limit its holding to married couples. That decision has been vacated by the Supreme Court, Wade v. Buchanan, 39 U.S.L.W. 3423 (1971), however, and remanded for reconsideration in light of the abstention principles recently enunciated by the Supreme Court in Younger v. Harris (39 U.S.L.W. 4201) and Samuels v. Mackell (39 U.S.L.W. 4211). A ruling by the Texas Court of Criminal Appeals (11/25/70) that the sodomy statute challenged in Buchanan v. Batchelor is constitutional has been appealed to the U. S. Supreme Court, Pruett v. Texas, 39 U.S.L.W. 3439 (No. 1390).

7/ That the Supreme Court talked in Griswold of this (continued on next page)

page 29 of Appellant's opening brief.

We submit that the state's purported interest in "protecting its citizens from moral decay" (governments brief p. 13) is a far cry indeed from the compelling interest necessary to overcome the individual's constitutional guarantee of freedom in his private sexual life. The government appears to concede that the D. C. Sodomy statute could not constitutionally be applied to the behavior of married persons (government brief pp. 11-13). Yet nowhere in the statute is a distinction made between married and unmarried persons.

The purported legislative purpose of preventing "moral decay" is an attempt to unconstitutionally proscribe certain sexual activity by all persons, married or unmarried. Such attempts to legislate against "moral decay" in private, adult, consensual sexual relationships have been rejected by this and

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7/ right of privacy in terms of the marital relationship was but a manifestation of the fact that the issue before the Court in that case was the application of the Connecticut anti-contraceptive law to physicians who disseminated contraceptive information to married persons. The right of privacy of unmarried persons was not in issue. The Court recognized, however, that "the zone of privacy [is] created by several fundamental constitutional guarantees" (381 U.S. at 485) -- guarantees which are not limited to married persons.

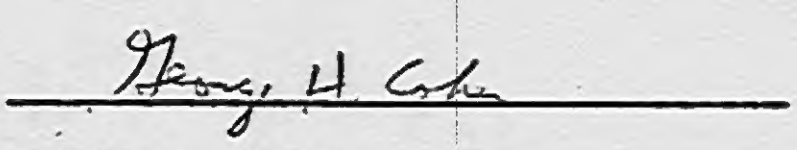
other courts. See Roe, supra: Babbitz, supra; Belous, supra. See also, Norton v. Macy, supra at 1165; Mindel, supra; In re Labady, 39 U.S.L.W. 2558 (U.S.D.C., S.D.N.Y. March 23, 1971).

Thus, the D. C. sodomy statute is unconstitutional insofar as it purports to make criminal consensual activity committed in private by adults. It was, therefore, error for the court below to refuse to instruct the jury that consent is a defense to a charge of sodomy.

CONCLUSION

For the reasons set forth above and in our opening brief, the jury verdict should be set aside and appellant acquitted, or, alternatively, granted a new trial.

Respectfully submitted,



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